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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 120313185-2727-01]

RIN 0648-BC01

Fisheries off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Trawl Rationalization Program; Reconsideration of Allocation of Whiting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: This action proposes revisions to several portions of the Pacific Coast Groundfish Fishery Trawl Rationalization Program regulations and requests comments on NMFS' preliminary conclusion that the Pacific Fishery Management Council's (Council's) selection of the no action alternative regarding the reconsideration of initial allocation of Pacific whiting (whiting) is consistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Pacific Coast Groundfish Fishery Management Plan (FMP), and other applicable law.. This action is necessary to comply with a court order requiring NMFS to reconsider the initial allocation of whiting to the shorebased individual fishing quota (IFQ) fishery and the at-sea mothership fishery. These proposed regulatory changes would affect the transfer of quota share (QS) and individual bycatch quota (IBQ) between QS accounts in the shorebased IFQ fishery, and severability of catch history assignments in the mothership fishery, both of which would be allowed on specified dates with the exception of widow rockfish. Widow rockfish is no

longer an overfished species and transfer of QS for this species will be reinstated pending reconsideration of the allocation of widow rockfish QS in a future action. The divestiture period for widow rockfish QS in the IFQ fishery is also proposed to be delayed indefinitely.

DATES: Comments on this proposed rule must be received no later than 5 p.m., local time on [Insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2012-0063, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to [www.regulations.gov/#!docketDetail;D= NOAA-NMFS-2012-0063](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0063), click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- Mail: Submit written comments to William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115-0070; Attn: Ariel Jacobs.
- Fax: 206-526-6736; Attn: Ariel Jacobs.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Ariel Jacobs, 206-526-4491; (fax) 206-526-6736; [Ariel.Jacobs@noaa.gov](mailto:Ariel.Jacobs@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

In January 2011, NMFS implemented the trawl rationalization program for the Pacific coast groundfish fishery's trawl fleet (see 75 FR 78344; Dec. 15, 2010). The program was adopted in 2010 through Amendments 20 and 21 to the FMP and consists of an IFQ program for the shorebased trawl fleet (including whiting and non-whiting fisheries); and cooperative (coop) programs for the at-sea mothership and catcher/processor trawl fleets (whiting only). The initial allocations of whiting were challenged in Pacific Dawn v. Bryson, No. C10-4829 TEH (N.D. Cal.) (Pacific Dawn). Following a decision on summary judgment that NMFS had not considered all of the required information and failed to provide an adequate basis in setting the initial whiting allocations, the court, on February 21, 2012, issued an order remanding the regulations establishing the initial allocations of whiting for the shorebased IFQ fishery and the at-sea mothership fishery "for further consideration" consistent with the court's December 22, 2011, summary judgment ruling. The order requires NMFS to implement revised regulations before the 2013 Pacific whiting fishing season begins on April 1, 2013.

On February 29, 2012, NMFS informed the Council of the order issued in Pacific Dawn. NMFS requested that the Council initiate the reconsideration of the initial allocations for QS of whiting in the shorebased IFQ fishery and for whiting catch history assignments in the at-sea mothership fishery. NMFS also determined that a rulemaking was needed to delay or revise portions of the existing regulations while the Council and NMFS reconsidered the initial allocation of whiting, and informed the Council of its intent to publish an Advance Notice of

Proposed Rulemaking (ANPR) to notify the public of the reconsideration and the process the agency and Council would follow.

NMFS published the ANPR on April 4, 2012 (77 FR 20337), which, among other things, announced the court's order, the Council meetings that would be addressing the whiting reconsideration, and NMFS' plan to publish two rulemakings in response to the court order. These two rulemakings are referred to as Reconsideration of Allocation of Whiting, Rules 1 and 2 (RAW 1 and RAW 2, respectively).

#### RAW 1

NMFS used emergency action authority under the MSA section 305(c)(1), 16 USC 1855(c), for RAW 1, which was proposed on May 21, 2012 (77 FR 29955), with the final rule published on August 1, 2012 (77 FR 45508). RAW 1 delayed the ability to transfer QS and IBQ between QS accounts in the shorebased IFQ fishery, and to the ability to sever mothership/catcher vessel endorsement and its associated catch history assignment (CHA) from limited entry trawl permits in the mothership fishery, pending the outcome of the reconsideration. The August 1 emergency rule also delayed issuance of quota associated with whiting directed trips at the beginning of the 2013 fishing year, as recommended by the Council. The RAW 1 rule is effective through January 28, 2013, and may be extended for an additional 186 days, consistent with the MSA.

#### RAW 2

At its March 2-7, 2012, meeting, the Council received briefings from NMFS regarding the remedy order issued in Pacific Dawn and selected a three-meeting Council rulemaking process. On March 15, 2012, NMFS submitted a letter to the Council that provided a potential range of alternatives for reconsideration that NMFS believed was appropriate.

At its April 1-6, 2012, meeting, the Council received briefings from NMFS on the range of alternatives included in the March 15, 2012, letter, as well as guidance on allocation issues addressed in the MSA, agency guidance documents, and FMP goals and objectives. The Council received approximately two hours of public comment from nine individuals or groups of individuals and also received recommendations from its Groundfish Advisory Subpanel. After consideration of the public comment and advisory group recommendations, the Council added an additional alternative for analysis that would consider an allocation period of 2000-2010.

At the June 21-26, 2012, Council meeting, NMFS and Council staff gave an overview on the Draft Environmental Assessment (EA) and briefed the Council on the analysis of the range of alternatives. The Council, after listening to recommendations from its Groundfish Advisory Subpanel and public testimony, refined one alternative and asked staff to update the analyses over the summer based on this refinement. The Council did not select a preliminary preferred alternative, stating that it needed additional time to understand the analyses and information presented. The Council reconfirmed its intention to select a final preferred alternative at its September 2012 meeting.

At the September 13-18, 2012, Council meeting, the Council considered the Draft EA, which had been revised to incorporate more detailed information and analyzed a range of whiting allocation periods spanning the years between 1994 and 2010 for shoreside and mothership catcher vessels, and the years between 1998 and 2010 for shoreside processors. The Council listened to testimony from 24 individuals or groups of individuals, totaling nearly seven hours of public testimony and also received advisory body reports from both the Groundfish Advisory Subpanel and the Scientific and Statistical Committee. Following Council discussion, the Council voted to select the no-action alternative (initial whiting allocation qualifying years of

1994 through 2003 for the shoreside and mothership catcher vessels and 1998 through 2004 for shoreside whiting processors) as the final preferred alternative.

On October 30, 2012, the Council transmitted to NMFS its recommendation that the no-action alternative be adopted; the letter and its accompanying rationale are available at the Council's website at [http://www.pcouncil.org/wp-content/uploads/Xmit\\_WhtgRealloc\\_Ltr.pdf](http://www.pcouncil.org/wp-content/uploads/Xmit_WhtgRealloc_Ltr.pdf).

#### Rationale for Proposing No Changes to the Initial Allocations of Whiting

The MSA requires NMFS to review all regulations that the Council submits to determine whether the regulations are consistent with the MSA, the FMP, and other applicable law (16 U.S.C. 1854(b)). NMFS reviewed the Council record and the proposed regulatory language and has preliminarily determined that the Council's recommendation to maintain the existing initial whiting allocations is consistent the MSA, the FMP, the court's order in Pacific Dawn, and other applicable law. NMFS requests comments on this conclusion; after review of the comments and the record as a whole, NMFS will make a final decision that will be announced in the Federal Register. The reasons for NMFS' preliminary determination are discussed below.

The MSA establishes the general requirement that allocations be fair and equitable (see e.g., 16 U.S.C. 1851(a)(4)). For allocations made in association with limited access privilege programs, the MSA further requires that the Council or NMFS must "establish procedures to ensure fair and equitable initial allocations, including consideration of: (i) current and historical harvests; (ii) employment in the harvesting and processing sectors; (iii) investments in, and dependence upon, the fishery; and (iv) the current and historical participation of fishing communities" (16 U.S.C. 1853a(c)(5)(A)). Although the Council's recommendation must be consistent with the MSA as a whole when viewed in light of the FMP, the factors listed above were essential to the Council's and NMFS' decisions.

Ultimately, NMFS believes that irrespective of the qualifying years chosen as a result of the reconsideration, there is not one alternative that would be perceived as equally fair and equitable by all participants. Further, as long as the Council recommendation provides for a fair and equitable allocation by consideration of the required factors, and the Council and NMFS provide a reasonable explanation for that decision, then the requirements of 16 U.S.C. 1853a(c)(5)(A) are satisfied. Simply put, the MSA does not require a particular outcome for the allocation decision at issue here. This section addresses each factor from 16 U.S.C. 1853a(c)(5)(A) in a general fashion, followed by the overarching considerations that lead NMFS to preliminarily conclude that the initial whiting allocations are fair and equitable.

#### Current and Historical Harvests

The alternatives that the Council examined allocated quota using catch history based on a range of years—1994 through 2010—that is as wide as possible given the best available scientific information on the groundfish trawl fleet prior to implementation of Amendment 20. Under the existing qualifying period for harvesters of 1994 through 2003, previously qualifying permits with catch history post-2003 or new entrants after 2003 do not have that catch history count towards their initial allocation of whiting. However, in light of the overarching considerations, the whiting allocation to harvesters based on a qualifying period of 1994 through 2003 is fair and equitable, and furthers the purposes of Amendment 20.

Consideration of current and historical harvests appears less relevant to the issue of the qualifying period for processors because processors do not “harvest” fish. To the extent that current and historical harvests relate to the decision on an appropriate qualifying period for processors, this factor is considered by examining the current and historical harvests delivered to shorebased processors. Current and historical harvests and their relationship to processors are

also considered indirectly through the other three factors. NMFS specifically requests comment on the relevance of “current and historical harvests” to the determination of the qualifying period for processors.

#### Employment in the Harvesting and Processing Sectors

The Draft EA concludes that rationalization brings changes in the nature and patterns of employment in both the processing and harvesting sectors. While there may be some initial local shifts or variations in employment depending on the whiting allocation alternative chosen, the analysis did not anticipate notable variation in the stability or level of employment overall among the identified alternatives. However, the Groundfish Advisory Subpanel and the Draft EA also noted that moving the end year of the qualifying periods to include more recent years could result in additional QS being allocated to processors in the north, which is where much of the whiting harvest and processing has more recently been taking place. Although the Draft EA indicates that the actual location of whiting harvest and delivery to processors appears to be predominately affected by factors other than the amount of whiting QS held in a given geographic area, the QS is still an asset for processors that can be used to offset the effects of some of the geographic shifts that may occur irrespective of QS distribution. Additionally, some processors testified as to the importance of their QS in attracting additional whiting deliveries to their facilities. Maintaining the 1998-2004 time period for processors and its broader geographic distribution may contribute to employment in coastal communities when paired with the 1994-2003 qualifying period for harvesters. Further, in light of the overarching considerations, the existing qualifying periods result in a fair and equitable allocation. NMFS specifically requests comments on the degree to which the existing qualifying periods, or the alternative qualifying periods considered, could affect employment in the harvesting and processing sectors.



### Investments In, and Dependence Upon, the Fishery

The MSA does not provide a definition of “dependence.” In general terms, dependence upon the fishery relates to the degree to which participants rely on the whiting fishery as a source of wealth, income, or employment to financially support their business. Current harvests, historical harvests, levels of investment over time, and levels of participation over time are all aspects of dependence, as they can all be connected to the processes that fishers and processors use to generate income. The level of dependence could be viewed as a function of any number of metrics including: the number of the years an entity has participated in the fishery; the total whiting harvested or the amount processed by an entity; the sum total of all fish harvested or processed by an entity; the total income earning activities by an entity (for example, some processors process fish for other processors, or help in the trucking of fish); or an entity’s relationship to other entities (for example, one company may own several processing plants or limited entry permits another company may be closely affiliated with another company either through ownership relationships or through sales agreements). However, these are all just individual measurements of factors that are related to dependence, not measures of dependence in and of themselves. Furthermore, it is difficult to calculate “dependence” per se even using all of these measures.

The extent to which participation in the harvesting or processing of whiting past the 2003-2004 end of the qualifying periods reflects dependence upon the fishery is largely reliant upon the metric used to evaluate dependence and the time periods during which that metric is applied. Although some of the alternatives considered would allocate more quota to the most recent participants in the fishery, even assuming recent participation in the fishery is the appropriate metric for evaluating the level of dependence, the overarching considerations lead

NMFS to preliminarily conclude that the existing qualifying periods for harvesters and processors result in a fair and equitable allocation, consistent with the MSA. As discussed more fully below, the choice of ending the qualifying period for processors in 2004 rather than the 2003 control date was done to explicitly recognize investments in processing while still furthering the purposes of Amendment 20.

Moreover, the fact that the existing qualifying period for harvesters results in some limited QS allocation to permits without activity in the whiting fishery post 2003 does not alter NMFS' conclusion. Under the status quo qualifying period, there were twenty-one limited entry trawl permits and 14 mothership/catcher vessel endorsed limited entry trawl permits that received whiting quota share or catch history assignments even though they did not fish after 2003. The analysis then researched whether these permits were fished in the other whiting sector, other Pacific groundfish fisheries, other west coast fisheries, or in other Alaska fisheries. After accounting for participation in other fisheries, there were a total of nine permits (shoreside or mothership) that apparently had no fishing activity off the West Coast or Alaska after 2003. These nine permits translate into 1.3 percent of the total shoreside whiting QS and 1.0 percent of the total mothership catch history assignments used for the 2011 and 2012 fisheries. However, the data set used for analysis may not have been complete as the permit may be owned by an entity that participates in fisheries other than west coast and Alaska fisheries. Furthermore, while some quota goes to harvester permits with no recent history under a 2003 end year for harvesters, the analysis in the record reflects that the extent of truly latent permits (not associated with an entity with recent whiting landings) is very small (roughly one percent for both shoreside and mothership harvesters). Awarding QS to these "latent" permits is consistent with the goal of reducing overcapitalization in the fishery and ending the "race for fish" because to do otherwise

(i.e. award QS for activities beyond the control date) would create incentives for participants to expand their activities and investments after control dates are announced in the hope that they would be rewarded quota share.

The Council analysis characterizes the limited entry permit as an asset or investment, a highly fishery dependent investment. The EA states that "after 2003, it is reported that permit prices varied substantially based on the history associated with the permit, in anticipation of the trawl program." Excluding changes due to company restructuring and changes due to death or divorce, eighteen permits changed hands after 2003 and before the end of 2010. Based on data recently collected by the NWFSC and public comment, during 2009-2010, three permits were sold at values that averaged about \$315,000. The Council analysis also discussed the portfolio concept of permits. Fishermen frequently own several different types of permits as a business strategy to respond to the ups and downs of various fisheries. (A portfolio could include one or more limited entry trawl permits along with permits to crab, shrimp, or to fish in the Alaska Pollock fishery.) To participate in the trawl fishery, a person first needs to obtain one of a limited number of permits (at the time of implementation of the trawl rationalization program, there were 175 trawl endorsed permits). However, after investing in a permit, a permit owner has several options on how to use that investment. The permit owner can fish the permit with his vessel or lease the permit to another person. The owner can also sell the permit or choose not to fish the permit or have anyone else fish the permit. As evidence of the importance of this investment, the permit owner needs to renew and pay a permit fee annually. The Region has preliminarily concluded that these types of investments are an important factor in determining dependence on the fishery. NMFS is requesting comment on the extent that such investments reflect dependence on the fishery.

Some believe that most recent fishing history is the best reflection of dependence on the fishery. There is no NMFS guidance on the measurement of dependence. Equating dependence solely to recent fishing history could be in a sense “double counting” as the MSA already indicates that “current” harvests are to be considered as a separate factor. From review of other NMFS and Council analyses, indicators of dependence are typically based on measures that relate the IFQ fishery revenues (whiting) to total revenues earned by the entity (whiting, crab, shrimp, pollock, etc.). It is not NMFS policy to use recent fishing as the only reflection of dependence on the fishery, nor is it NMFS policy to use recent fishing as the sole basis for determining the allocation period; such a determination must always be based on the specific facts each time allocations are considered. NMFS specifically requests comments on the degree to which the existing qualifying periods, or the alternative qualifying periods considered, result in a fair and equitable allocation when considering investments in and dependence upon the fishery, including what metrics should be considered in measuring investment in and dependence on the fishery and why, based on those metrics, any of the alternatives result in a fair and equitable allocation.

#### The Current and Historical Participation of Fishing Communities

The Council considered the current and historical participation of fishing communities in several ways. Similar to the analysis for current and historical harvests, by examining alternatives with a wide range of years, the Council and NMFS were able to review the current and historical participation of communities as they changed over time. Further, the original decision on Amendment 20 contained measures that examined the role of fishing communities over time. For example, the 20 percent allocation to processors was intended to provide increased stability to communities by creating an added incentive for catcher vessels to land

whiting in those communities and increase bargaining parity between harvesters and processors.

The Draft EA also notes that:

More certain than the initial allocation's effect on long-term distribution of fishing activity among communities is the one-time distribution of wealth in the form of quota shares going to members of the communities and the secondary effects that this one-time distribution of wealth may have as it affects expenditures within the community. Thus, what is at stake in the initial allocation is not necessarily a disruption to what entities are able to harvest, but rather an initial allocation of wealth and, through the wealth represented by the QS/CHA, an augmented ability to make up any shortfalls through QS/CHA acquisitions in the market place. Those receiving larger initial allocations, larger initial grants of wealth, will be better-positioned to finance or other wise make additional purchases of QS/CHA to make up for any shortfalls in their initial allocations.

NMFS preliminarily concludes that the existing qualifying periods reflect fair and equitable allocations that were intended to spread the impacts of the trawl rationalization program along the coast. NMFS specifically requests comments with respect to current and historical participation of fishing communities and how consideration of this factor supports the existing whiting allocations, or the other alternative qualifying periods considered.

#### Overarching Considerations

NMFS believes a crucial consideration that must be taken into account when reviewing the initial whiting allocation decision is the control date. Historically, the Council and other fishery management councils have announced and adopted control dates to prevent speculative participation in a fishery pending development of a limited access program, with the intent that

the developed program may use the control date as the end date of fishing history that would count toward establishing initial allocations, if appropriate. Since adopting the initial control date in 2003 (announced in a Federal Register notice in early 2004), the Council and NMFS have actively worked on developing and refining the groundfish trawl catch share program. As discussed in detail in the draft EA, beginning in 2003, the Council held numerous public committee meetings (averaging ten a year), conducted public discussions on the trawl program during numerous Council meetings, and worked consistently on the program over a seven year period (2003-2010).

In deciding to develop a catch share program for the groundfish trawl fishery, the Council was concerned with the problems of overcapitalization and ending the race for fish. By notifying existing and potential participants that the Council was seriously pursuing development of a catch share program, the Council intended to deter additional unwanted effort and capital in the fishery. NMFS recognizes that the plain language of the Federal Register notice announcing the control date does not “guarantee” that activity occurring in any specific period will count toward initial allocations. In addition, control dates have been abandoned in the past for various reasons by this Council and in other regions. However, NMFS also believes it was reasonable for participants to interpret the control date as signaling a potential end date for the qualifying period, and there was extensive public testimony reflecting the fact that many participants did in fact make business decisions based on the control date. Testimony from some participants indicated that had they thought the control date would not be used as the end of the qualifying period, they would have changed plans to increase their whiting harvests while leasing their quota in other fisheries. In addition, if fishermen believed that activity beyond the control date would result in more quota, they could have chosen to invest additional capital into their boats,

thus increasing overcapitalization and exacerbating the race for fish. Accordingly, participants who made business decisions based on the assumption that the control date would be used as the end of the qualifying period acted in a manner consistent with the conservation goals of the Council. In addition, based on the fact that the control date modified at least some participants' fishing behavior, extending the qualifying period further into the future could result in participants in other fisheries disregarding any signal sent by announcing a new control date in a different program.

Although the length of time between the original control date and the agency approval in 2010, implementation of the program in 2011, and this proposed decision in 2012, is longer than the comparable time span in most programs that announce control dates, this is explained by the complexity of the program, which resulted in significant time needed to involve the public and fishery participants, develop alternatives, develop appropriate analytical documents, reach a final decision, and implement that decision. The trawl rationalization program includes multi-species trading in a diverse fleet composed of small trawlers, large motherships, and catcher-processors in communities along most of the West Coast of the United States. From the time the control date was announced, there was continuous and systematic effort by the Council and the agency to develop and implement, with full public participation, one of the most complex rationalization programs ever devised.

For the harvesters, the 1994–2003 period is the widest date range possible to base allocations on landings history while ending the qualifying period on the control date. Using this qualifying period recognizes the conservation benefits accruing from those whose fishing behavior did not change in an effort to gain more quota. While some public testimony indicated that their increased effort post-2003 was not a result of speculation, there is no mechanism

available to separate out speculative behavior from non-speculative nor is there any way to quantify the extent to which the control date prevented additional speculative effort or capital. By maintaining the control date as the cut-off, however, those who did engage in such speculation are not rewarded and those who honored the control date are not penalized. Although the Council and NMFS were aware that new entrants had come into the whiting fishery since 2003, these entrants did so aware of the control date and that their activity after 2003 may not count toward any initial allocation decision. While maintaining the existing cutoffs for initial allocations excludes more current harvest and landings from the allocation formulas, the impacts to the dependence and investments of most participants are relatively modest. For example, the shift of whiting quota shares that would result from status quo to Alternative 4 (which most favors recent history) represents only 17 percent for shorebased catcher vessels, and 3.1 percent for shorebased processors. Therefore it is still fair and equitable to have some recent catch history not count toward initial allocations. Maintaining the control date as the end of the qualifying period for harvesters is fully consistent with the original purposes of Amendment 20, including reducing overcapitalization and ending the race for fish. However, for processors, the Council chose the end year of 2004, contrary to the 2003 control date, fairly late in the original decision-making process.

NMFS preliminarily concludes that the Council's recommendation to use 2004 as the end year for processors is supported by several rationales. First, the Council received testimony that there was a significant investment in whiting processing capability made in 2002 and 2003 before the control date was announced, and as discussed further below, before the applicability of the control date to processors was clarified. That investment did not begin to earn processing history until 2003 and 2004. The Council considered this information in making its original



initial allocation, and in more detail during the reconsideration. The Council concluded that it would be unfair to not recognize this investment decision that was made prior to the control date. By extending the qualifying period for processors to 2004, some of the additional processing capabilities could be recognized as part of the qualifying history. Furthermore, testimony received during the Council's reconsideration revealed no significant change from their knowledge of processor investments in the whiting fishery, i.e., no testimony indicated other processors made a significant investment before the 2003 control that became operational in 2004 or later.

In addition, the originally published Federal Register notice of the 2003 control date did not clearly indicate that the date applied to processors. Subsequent clarifications were published in the middle of the 2004 season and just prior to the start of the 2005 fishing season. Accordingly, in addition to at least partially crediting investment decisions made prior to the control date, extending the end year of the qualifying period to 2004 reasonably accounts for the fact that processors may not have had adequate notice of the applicability of the 2003 control date until after the start of the 2004 whiting season.

Since the investment decision was made before the control date, changing the end year of the qualifying period for processors to 2004 did not benefit those who decided to increase processing capacity after they were aware that 2003 control date could potentially apply to processors. While adopting 2004 for processors does move beyond the original control date, it only departs by a single year and does so for what NMFS preliminary concludes are valid justifications. NMFS specifically requests comment on the importance of using the control date as the end of the qualifying period for harvesters and the rationale for varying the end of the qualifying period for processor by one year to 2004.

Overall, there is a sufficient basis for NMFS to preliminarily conclude that the Council's initial whiting allocation recommendation, including using qualification years of 1994-2003 for whiting harvesters and 1998-2004 for whiting processors, is consistent with the requirements of the MSA, the FMP, and other applicable law, and provides for a fair and equitable initial allocation to the shoreside and mothership sectors of the whiting fishery. As the NOAA Technical Memorandum entitled "The Design and Use of Limited Access Privilege Programs, (Anderson and Holliday, November 2007) suggests, the record to date confirms that it does not appear to be possible to devise whiting allocations that will be perceived as equally fair by all eligible entities. Consistent with that guidance, however, the Council and agency have followed a public and transparent process that involved all concerned stakeholders and allowed repeated opportunities to provide input. NMFS believes this process has been appropriate and essential to advancing a fair and equitable allocation. The record also establishes that in weighing the various factors identified under the MSA for initial allocations, there are inevitably tradeoffs that result under the various alternatives. In striking an overall balance, NMFS preliminarily finds that the reasons supporting maintaining the existing allocations for the shoreside and mothership whiting fisheries (e.g., honoring the control date and the policy goals of Amendment 20, wide geographic distribution of the program benefits and costs along the coast and the corresponding fishing communities) outweigh those favoring more recent history (e.g., reflection of the more current market and fishery conditions, providing greater amounts of quota to the most recent fishery participants, and reducing or eliminating quota shares to some permit holders that do not have recent history). NMFS also notes that the draft EA indicates that the action alternatives result in a larger number of permits losing quota share to the benefit of a smaller number of

permits that would gain quota share. NMFS requests comment on the overall balancing of the factors and impacts of this initial allocation decision.

#### Additional Considerations

NMFS requests comment on the following additional considerations relating to its preliminary determination that the proposed initial whiting allocations are fair and equitable and consistent with the MSA, FMP, and other applicable law.

#### Consideration of all the Relevant Factors and Information

NMFS finds that the relevant factors and best available information have been considered in compliance with requirements of the MSA in reaching its preliminary determination. NMFS requests comment over the degree to which there has been adequate consideration of the factors identified for initial allocations under the MSA including: current and historical harvests; employment in the harvesting and processing sectors; investments in, and dependence upon, the fishery; and, the current and historical participation of fishing communities. As reflected in the Council record and draft EA, additional factors have also been considered, and NMFS also requests comment on whether all other relevant factors and related information for each factor have been adequately considered.

#### Industry Support for Allocation

NMFS notes that at the time of the original initial allocation decision and during the reconsideration before the Council, it appeared that the most, but not all, of participants supported the use of the existing qualifying periods rather than any of the alternatives considered. NMFS finds that the industry support for the original allocations referred to in the earlier record and the court summary judgment order in Pacific Dawn as a “compromise” was in fact appropriate input from the affected industry that was developed as part of the overall

transparent and public process that established the catch shares program. NMFS requests comment from the public on this issue, including on the degree to which industry supports the existing allocations, the extent to which NMFS should take into account the degree of industry support, and how the amount of support should inform consideration of the factors listed in the MSA for allocation decisions in light of the analysis provided in the draft EA.

### Regulatory Proposals

NMFS proposes to revise the portions of the regulations that were temporarily delayed or revised by RAW 1. Additionally, to be consistent with Council action at its November 2012 meeting on a QS transfer provision affecting widow rockfish, NMFS proposes to extend the moratorium on transfer of widow rockfish QS in the IFQ fishery indefinitely pending the Council's reconsideration of the allocation of QS for widow rockfish. Specifically, NMFS proposes to:

(1) Allow transfer of QS or IBQ (except for widow rockfish QS) between QS permit holders in the shorebased IFQ fishery beginning January 1, 2014;

(2) Require QS permit holders in the shorebased IFQ fishery holding QS or IBQ in excess of the accumulation limits to divest themselves of excess QS (except for widow QS) or IBQ by November 30, 2015;

(3) Allow limited entry trawl permit holders in the mothership fishery to request a change (or transfer) of mothership/catcher vessel (MS/CV) endorsement and its associated catch history assignment (CHA) beginning September 1, 2014;

(4) Require MS/CV endorsed limited entry trawl permit owners to divest themselves of ownership in permits in excess of the accumulation limits by August 31, 2016; and

(5) Extend the divestiture period delay and moratorium on transfer of widow rockfish QS in the shorebased IFQ fishery indefinitely.

Each of these elements is described in further detail below.

Allow Transfer of QS or IBQ, Except Widow QS, Between QS Permit Holders Beginning January 1, 2014

The trawl rationalization program, as implemented in January 2011, delayed QS holders' ability to transfer QS and IBQ between QS accounts in the shorebased IFQ fishery through December 31, 2012 (i.e., transfer could begin in 2013). RAW 1 further delayed QS holders' ability to transfer QS and IBQ between QS accounts. This suspension of QS transfers was necessary to avoid complications which would occur if QS permit owners in the shorebased IFQ fishery were allowed to transfer QS percentages prior to the whiting allocation reconsideration. Since NMFS proposes to concur with the Council's no action recommendation, no changes to the initial whiting allocations are proposed. However, NMFS still requires adequate time to develop the regulations and software necessary to allow for transfer of QS, and the Council has not taken final action regarding reallocation of widow rockfish quota. Therefore, the Council recommended and NMFS proposes to revise § 660.140(d)(3)(ii)(B)(2) to allow transfer of QS or IBQ (except for widow rockfish QS) between QS permit holders in the shorebased IFQ fishery, subject to accumulation limits and approval by NMFS, beginning January 1, 2014. Additionally, the rule would reinstate language that QS and IBQ cannot be transferred between December 1 and December 31 of each year, nor may QS and IBQ be transferred to a vessel account.

Require QS Permit Holders in the Shorebased IFQ fishery Holding QS or IBQ in Excess of the Accumulation Limits to Divest Themselves of Excess QS (Except for Widow QS) or IBQ by November 30, 2015

The delayed implementation of regulations that allow for the transfer of QS necessitates a corresponding delay to the divestiture periods for those QS permit owners with QS over the accumulation limits (also called QS control limits) in the shorebased IFQ fishery. The current regulations, as revised by RAW 1, state that QS permit owners that have an initial allocation of QS or IBQ in excess of the accumulation limits will be allowed to receive that allocation, but must divest themselves of the excess QS or IBQ during the first two years once QS transfers are allowed. Maintaining the full two years for divestiture would provide QS permit owners with sufficient time to plan and arrange sales of excess QS, as originally recommended by the Council for this provision of the trawl rationalization program. While two years from January 1, 2014, is December 31, 2015, the regulations prior to RAW 1 and being proposed to be reinstated with this rule at § 660.140(d)(3)(ii)(B)(2) state that the transfer of QS between QS accounts and from a QS account to a vessel account is prohibited between December 1 through December 31. Therefore, this rule proposes to revise § 660.140(d)(4)(v) to require QS permit holders in the shoreside IFQ fishery holding QS or IBQ in excess of the accumulation limits to divest themselves of excess QS (except for widow rockfish QS) or IBQ by November 30, 2015. Widow rockfish QS in excess of the accumulation limit would not be subject to the November 30, 2015, deadline for divestiture because widow rockfish QS may be reallocated as described later in the preamble under the extended moratorium on widow QS transfers.

Allow Limited Entry Trawl Permit Holders in the Mothership Sector to Request a Change (or Transfer) of MS/CV Endorsement and its Associated CHA Beginning September 1, 2014

RAW 1 instituted a delay in the ability of limited entry trawl permit owners in the mothership sector to transfer MS/CV endorsements and CHAs between limited entry trawl permits. The rationale for this action was similar to that for delaying QS transfers in the

shorebased IFQ fishery; if permit owners were allowed to transfer ownership of CHAs before the reconsideration took place, then it would be difficult for NMFS to track changes to the initial allocations of whiting and other incidentally caught species. As recommended by the Council, consistent with the recommendation to make no changes to the initial allocations of whiting, NMFS proposes to revise § 660.150 (g)(2)(iv)(B) and (C) to allow limited entry trawl permit holders in the mothership sector to request a change (or transfer) of MS/CV endorsement and its associated CHA beginning September 1, 2014.

Require MS/CV-endorsed Limited Entry Trawl Permit Owners to Divest Themselves of Ownership in Permits in Excess of the Accumulation Limits by August 31, 2016

Delayed implementation of regulations that allow for severability of the MS/CV endorsement and its associated CHA from the limited entry trawl permit in the mothership sector necessitates a corresponding delay to the divestiture periods for those limited entry trawl permit owners with CHA in excess of the accumulation limits for that sector. As recommended by the Council, NMFS proposes to revise § 660.150(g)(3)(i)(D) to require MS/CV-endorsed limited entry trawl permit owners to divest themselves of ownership in permits that have CHA in excess of the accumulation limits by August 31, 2016. Additionally, NMFS proposes that after August 31, 2016, any MS/CV-endorsed permits owned by a person (including any person who has ownership interest in the owner named on the permit) in excess of the accumulation limits will not be issued (renewed) until the permit owner complies with the accumulation limits.

Extend Moratorium on Transfer of Widow Rockfish QS in the Shorebased IFQ Fishery Indefinitely

This rule proposes to extend the moratorium on transfer of widow rockfish QS in the IFQ fishery indefinitely pending reconsideration of the allocation of QS for widow rockfish. The

Council intends to reconsider widow rockfish QS allocations in the future because widow rockfish is no longer an overfished species and will be managed as a healthy, rebuilt stock beginning in 2013. NMFS proposes this change at § 660.140(d)(3)(ii)(B)(2).

#### Classification

Pursuant to section 304(b)(1)(A) of the MSA, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the Pacific Coast Groundfish FMP, other provisions of the MSA, and other applicable law, subject to further consideration after public comment. To the extent that the regulations in this rule differ from what was deemed by the Council, NMFS invokes its independent authority under 16 U.S.C. 1855(d).

The Council and NMFS prepared a draft environmental assessment (EA) for the reconsideration of initial whiting allocation that discusses the impact on the human environment of the proposed rule. While the draft EA considers more recent information, the Council recommended and NMFS is proposing the “No Action” alternative which retains the original initial allocations of whiting in the IFQ and mothership fisheries from Amendment 20. A copy of the EA is available on NMFS’ website at <http://www.nwr.noaa.gov/Groundfish-Halibut/Groundfish-Fishery-Management/Trawl-Program/index.cfm>. Aspects related to this action were previously discussed in the final environmental impact statement (EIS) for Amendments 20 to the Pacific Coast Groundfish FMP which discussed the structure and features of the original trawl rationalization program. A notice of availability for the final EIS published on June 25, 2010 (75 FR 36386). The Amendment 20 EIS is available on the Council’s website at <http://www.pcouncil.org/> or on NMFS’ website.

OMB has determined that this action is not significant for purposes of Executive Order 12866.



A Regulatory Impact Review (RIR) was prepared on the action in its entirety and is included as part of the initial regulatory flexibility analysis (IRFA) on the proposed regulatory changes. The IRFA and RIR describe the impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the SUMMARY section of the preamble. A copy of the IRFA is available from NMFS (*see* ADDRESSES).

#### Reconsideration of Initial Allocation of Whiting

The Council considered four alternatives for allocating whiting. The following analysis compares the “status quo” alternative to Alternative 4 as they show greatest differences between the pre-control date fishery and post-control date fishery. The “status quo” alternative allocates whiting using the years 1994 to 2003 for harvesters (shoreside and mothership) and 1998-2004 for processors. Alternative 4 allocates whiting using the years 2000-2010 for both harvesters (shoreside and mothership) and processors. Over the years 1994-2010, there were 65 fishing permit holders that participated in the shoreside fishery and 37 permit holders that participated in the mothership fishery. Over the years 1998 to 2010, there were 16 processors that participated in the fishery and that meet the recent participation criteria of the various alternatives.

Comparing the status quo alternative to Alternative 4 in terms of 2011 ex-vessel revenues, information on the gainers and losers in each of these affected groups can be developed from information in the Draft EA. The allocation of 98,000 mt to the 2011 shorebased whiting fishery was worth approximately \$21 million (exvessel value). Based on the status quo allocations, eighty percent of these quota pounds were allocated to fishing permits (\$17 million) and 20 percent to the shorebased processors (\$4 million). The allocation of 57,000 mt whiting to the whiting mothership catcher vessels was worth \$12 million in exvessel value. It is important

to note that 2011 was a peak year for the shorebased fishery and a near-peak year for the mothership fishery (see Figure 3-5 of the Draft EA). (Note: although exprocessor or “first wholesale” revenues are higher than exvessel values and would be a better indicator of processing activity levels, data on exprocessor sales were not readily available for use by the Council. A better indicator of the gains and losses by groups would be changes in profits (revenues less operating costs)).

The NWFSC has developed an estimate of economic net revenue that is an indicator of profits. Economic net revenue seeks to measure economic profit, which includes the opportunity costs of operating a commercial fishing vessel. The NWFSC collected and assessed 2008 cost-earning data on vessels participating in the shoreside groundfish fisheries including whiting. Vessels that participate in the shoreside whiting fishery are typically classified as either “whiting” vessels or “Alaska” vessels depending on whether or not they operated in Alaska. Whiting vessels are defined as those with at least \$100,000 revenue, of which at least 33% comes from whiting. Alaska vessels are defined as those vessels that earned at least \$100,000 in revenue of which at least 50% comes from Alaska fisheries. The average economic net revenue of a whiting vessel in 2008 was \$167,457, which represents 19.2% of revenue from all fisheries. Limited entry trawl vessels classified as Alaska vessels had an average economic net revenue of \$493,915, 28.3% of the \$1,744,793 revenue earned from all sources by these vessels. These estimates are based on revenue and cost information directly related to the operation of a commercial fishing vessel such as those associated with office space. Revenues are from West coast landings, Alaska landings, at-sea deliveries, sale and leasing of permits, chartering for research purposes and other activities related to the operation of the vessel. Compared to other years, these estimates may be high as whiting revenues and overall groundfish revenues were at

their highest annual level during the 2001-2010 period during 2008. However, crab revenues during 2008 on the West Coast were at their lowest level since 2003.

Compared with the status quo alternative, under Alternative 4 approximately 17% (\$3.7 million) of the allocation to shorebased catcher vessels would be transferred away from the status quo holders; twenty eight permit holders would gain quota share including six permits that did not qualify under the status quo alternative (Table 4-4 of the Draft EA). The largest gain by a single permit holder is 3.3% (\$700,000). Alternative 4 would lead to 37 permits losing quota share including 12 permits that would not receive any quota share. The largest loss by a single permit holder would be 2.0% of quota share (\$340,000). A total of 41 out of 65 permits will see a change of less than \$100,000 (increase or decrease) in revenues in comparing Alternative 4 to the status quo alternative.

In comparing Alternative 4 to the Status Quo alternative for shorebased processors, approximately 3.1% (\$660,000) of the allocation to shorebased processors would be transferred away from the status quo holders; nine processors would gain including seven processors that did not qualify under the status quo alternative (Table 4-29 of the Draft EA). The largest gain by a single processor would be 1.3% of quota share (\$275,000). Alternative 4 would lead to seven processors losing quota share, including three processors that would not receive any quota share. The largest loss by a single processor would be 0.8% of quota share (\$170,000). Nine out of 16 processors would see a change of less than \$100,000.

In comparing Alternative 4 to the Status Quo alternative for whiting mothership catcher vessels, approximately 18% (\$2 million) of the total catch history assignment would be transferred away from the status quo holders; 16 mothership catcher vessel endorsed permits would gain (Table 4-16 of the Draft EA). No new permits would qualify. The largest gain by a

single permit holder would be 4.5% of catch history assignment (\$545,000). Alternative 4 would lead to 21 permits with reduced catch history assignments, including 10 permits that would not receive any catch history assignment. The largest loss by a single catch history assignment holder would be 2.7% (\$333,000). Eighteen out of 36 permits would see a change of less than \$100,000.

However, in terms of net economic benefit to the nation, the effects of the alternatives are similar. According the PSMFC's Scientific and Statistical Committee: "The way the fisheries are actually prosecuted (geographic location of fishing and landings, timing of fishing, and participants) will in the long-term tend not to be affected by who receives the initial allocation of catch shares." Over time, the use of the catch shares will likely migrate through leases or sales to the participants who can put them to their most profitable use. This means that the eventual biological, ecological, and economic performance of the fisheries will be relatively independent of the initial allocation of catch shares. It has been the experience of many catch share programs that such transitions occur rather quickly, often within the first few years. As a consequence, the initial allocation of quota shares is not an effective tool to direct fishing or processing effort to particular geographic locations."

The initial allocation of whiting is a one-time distribution of wealth in the form of quota shares and catch history assignments to members of the fishing industry. The initial allocation is essentially the granting of a capital asset that will affect harvester and processor competitiveness and assist existing participants in the transition to the new management system. To the degree that initial allocation match up with the harvesters that will use the quota, transition costs and disruption will be lessened as the fishery moves to its long-term, more efficient state. Similarly,

those processors who receive an initial allocation may experience a boost in their competitive advantage due to the infusion of new wealth (the value of the QS received).

The initial allocation does not affect the long-term efficiency and operation of the fishery. However, liquidity constraints, and perhaps other unknown constraints, may mean that there are some short-term inefficiencies. For example, this one time distribution of wealth may affect expenditures in the communities depending on location and spending patterns of recipients of these quota shares and catch history assignments. The Draft EA provides the following regarding impacts on communities: “The effects of the initial allocations on the distribution of fishing among communities are difficult to predict. Quota is tradable and highly divisible, giving it a fluidity such that it will likely move toward those ports in which profit margins tend to be the highest, regardless of the initial allocations. Where profit margins are similar, allocations given to entities that are already invested in whiting fishery-dependent capital assets are likely to stay with those entities at least in the near term. Similarly, where profit margins are similar, there will likely be some tendency in the near term for quota that is traded to move toward locations where whiting fishery-dependent capital assets already exist. Regardless of how the quota is distributed, vessels may move operations between ports during the year based on the geographic distribution of fishing opportunities. Processors are likely to use their shares in the port in which their facilities are located, however, some processors have facilities in more than one port and so may shift harvest between ports in response to the location of fishing opportunities. At the same time, the recent shift of harvest toward more northern ports appears to be a response to investments in those ports, indicating that the location of fish is not the only factor driving the location of landings. Over the long term, it is expected that operations will move, or quota will

be traded, to the ports in which the highest profits can be earned, taking into account all forms of costs such as average distance to fishing grounds and catch and bycatch rates.”

While the discussion above concerns the long run efficiency and operation of the fishery, short run effects matter. The initial allocation of quota shares affects each participant's business operation, investments, and community. With the choice of the status quo alternative over alternatives that reflect more recent history, NMFS and the Council are providing to those who have historically participated in the fishery (the majority of which are also recent participants) are anticipated to have a better chance to benefit from the market processes described above.

#### RAW 1

This action also would revise several regulations that were delayed on an emergency basis in response to the Court order. RAW 1 delayed the ability to transfer QS and IBQ between QS accounts in the shorebased IFQ fishery, and to the ability to sever mothership/catcher vessel endorsement and its associated catch history assignment (CHA) from limited entry trawl permits in the mothership fishery, pending the outcome of the reconsideration.

NMFS postponed the ability to trade quota shares as well as the ability of mothership catcher vessels to trade their endorsements and catch history assignments separately from their limited entry permits. NMFS also postponed a delay in all trading of QS species/species groups because for many affected parties, their QS allocations (especially for bycatch species) are a composite of whiting-trip calculations and non-whiting trip calculations. Postponing these activities, while NMFS and the Council reconsidered the whiting allocation, minimize confusion and disruption in the fishery from trading quota shares that have not yet been firmly established by regulation. For example, if QS trading was not delayed, QS permit owners would be transferring QS amounts that potentially could change (increase or decrease) after the

reconsideration. For similar reasons, NMFS also delayed the ability to transfer a mothership catcher vessel (MS/CV) endorsement and associated catch history assignment from one limited entry trawl permit to another in the mothership sector. The ability to sell or trade a limited entry permit with the endorsement and catch history remains. The use of the catch history assignment to be assigned to a co-op to be fished continues. NMFS intends to announce any changes to the amount of catch history assignments associated with MS/CV-endorsed limited entry trawl permits by April 1, 2013 which is before the May 15 start date for the whiting mothership fishery. These delays were expected to be temporary in nature and to benefit both small and large entities as they help smooth the transition to any changes in how Pacific whiting is allocated, and reduce the uncertainty to existing and potential new holders of these allocations.

With these proposed regulations, those who find themselves with excess QS (except for widow QS) and IBQ, have until November 30, 2015, to divest. MS/CV-endorsed limited entry trawl permit owners will have to divest themselves of ownership in permits in excess of the accumulation limits by August 31, 2016. This rule allows limited entry trawl permit holders in the mothership sector to request a change (or transfer) of MS/CV endorsement and its associated CHA beginning September 1, 2014. Finally, this rule allows transfer of QS or IBQ, except widow rockfish QS, between QS permit holders beginning January 1, 2014.

The Small Business Administration has established size criteria for all major industry sectors in the US, including fish harvesting and fish processing businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and

employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. For marinas and charter/party boats, a small business is one with annual receipts not in excess of \$7.0 million.

Over the years 1994-2010, there were 65 limited entry trawl fishing permit holders that participated in the shoreside whiting fishery and 37 limited entry trawl fishing permit holders that participated in the mothership fishery. Over the years 1998 to 2010, 16 processors have participated in the fishery. NMFS NWR now collects small business information as part of its permit renewal processes. Based on that information and on other information, there are three large companies associated with the 16 processors and 13 small companies. Sixteen of the limited entry trawl permits that participated in the whiting fishery are associated with large companies and 49 of these permits are associated with small companies. In the mothership fishery 14 catcher vessel permits are associated with large companies and 23 with small companies.

No Federal rules have been identified that duplicate, overlap, or conflict with the alternatives. Public comment is hereby solicited, identifying such rules. A copy of this analysis is available from NMFS (see ADDRESSES).

NMFS issued Biological Opinions under the Endangered Species Act (ESA) on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993, May 14, 1996, and December 15, 1999, pertaining to the effects of the Pacific Coast groundfish PCGFMP fisheries



on Chinook salmon (Puget Sound, Snake River spring/summer, Snake River fall, upper Columbia River spring, lower Columbia River, upper Willamette River, Sacramento River winter, Central Valley spring, California coastal), coho salmon (Central California coastal, southern Oregon/northern California coastal), chum salmon (Hood Canal summer, Columbia River), sockeye salmon (Snake River, Ozette Lake), and steelhead (upper, middle and lower Columbia River, Snake River Basin, upper Willamette River, central California coast, California Central Valley, south/central California, northern California, southern California). These biological opinions have concluded that implementation of the PCGFMP for the Pacific Coast groundfish fishery is not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or result in the destruction or adverse modification of critical habitat.

NMFS issued a Supplemental Biological Opinion on March 11, 2006, concluding that neither the higher observed bycatch of Chinook in the 2005 whiting fishery nor new data regarding salmon bycatch in the groundfish bottom trawl fishery required a reconsideration of its prior “no jeopardy” conclusion. NMFS also reaffirmed its prior determination that implementation of the Groundfish PCGFMP is not likely to jeopardize the continued existence of any of the affected ESUs. Lower Columbia River coho (70 FR 37160, June 28, 2005) and Oregon Coastal coho (73 FR 7816, February 11, 2008) were recently relisted as threatened under the ESA. The 1999 biological opinion concluded that the bycatch of salmonids in the Pacific whiting fishery were almost entirely Chinook salmon, with little or no bycatch of coho, chum, sockeye, and steelhead.

On December 7, 2012, NMFS completed a biological opinion concluding that the groundfish fishery is not likely to jeopardize non-salmonid marine species including listed

eulachon, green sturgeon, humpback whales, Steller sea lions, and leatherback sea turtles. The opinion also concludes that the fishery is not likely to adversely modify critical habitat for green sturgeon and leatherback sea turtles. An analysis included in the same document as the opinion concludes that the fishery is not likely to adversely affect green sea turtles, olive ridley sea turtles, loggerhead sea turtles, sei whales, North Pacific right whales, blue whales, fin whales, sperm whales, Southern Resident killer whales, Guadalupe fur seals, or the critical habitat for Steller sea lions.

As Steller sea lions and humpback whales are also protected under the Marine Mammal Protection Act, incidental take of these species from the groundfish fishery must be addressed under MMPA section 101(a)(5)(E). On February 27, 2012, NMFS published notice that the incidental taking of Steller sea lions in the West Coast groundfish fisheries was addressed in NMFS' December 29, 2010, Negligible Impact Determination (NID) and this fishery has been added to the list of fisheries authorized to take Steller sea lions (77 FR 11493, Feb. 27, 2012). NMFS is currently developing MMPA authorization for the incidental take of humpback whales in the fishery.

On November 21, 2012, the U.S. Fish and Wildlife Service (FWS) issued a biological opinion concluding that the groundfish fishery will not jeopardize the continued existence of the short-tailed albatross. The (FWS) also concurred that the fishery is not likely to adversely affect the marbled murrelet, California least tern, southern sea otter, bull trout, nor bull trout critical habitat.

This proposed rule was developed after meaningful consultation and collaboration, through the Council process, with the tribal representative on the Council. The proposed regulations have no direct effect on the tribes.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, and Indian fisheries.

Dated: December 27, 2012.

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Alan D. Risenhoover, Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq., 16 U.S.C. 773 et seq., and 16 U.S.C. 7001 et seq.

2. In § 660.140, revise paragraphs (d)(3)(ii)(B)(2) and (d)(4)(v) to read as follows:

§ 660.140 Shorebased IFQ Program.

\* \* \* \* \*

(d) \* \* \*

(3) \* \* \*

(ii) \* \* \*

(B) \* \* \*

(2) Transfer of QS or IBQ between QS accounts. Beginning January 1, 2014, QS permit owners may transfer QS (except for widow rockfish QS) or IBQ to another QS permit owner, subject to accumulation limits and approval by NMFS. QS or IBQ is transferred as a percent, divisible to one-thousandth of a percent (i.e., greater than or equal to 0.001%). Until January 1, 2014, QS or IBQ cannot be transferred to another QS permit owner, except under U.S. court order or authorization and as approved by NMFS. QS or IBQ may not be transferred between December 1 through December 31 each year. QS or IBQ may not be transferred to a vessel account. The prohibition on transferability of widow rockfish QS is extended indefinitely pending final action on reallocation of widow rockfish QS.

\* \* \* \* \*

(4) \* \* \*

(v) Divestiture. Accumulation limits will be calculated by first calculating the aggregate non-whiting QS limit and then the individual species QS or IBQ control limits. For QS permit owners (including any person who has ownership interest in the owner named on the permit) that are found to exceed the accumulation limits during the initial issuance of QS permits, an adjustment period will be provided after which they will have to completely divest their QS or IBQ in excess of the accumulation limits. QS or IBQ will be issued for amounts in excess of accumulation limits only for owners of limited entry permits as of November 8, 2008, if such ownership has been registered with NMFS by November 30, 2008. The owner of any permit acquired after November 8, 2008, or if acquired earlier, not registered with NMFS by November 30, 2008, will only be eligible to receive an initial allocation for that permit of those QS or IBQ that are within the accumulation limits; any QS or IBQ in excess of the accumulation limits will

be redistributed to the remainder of the initial recipients of QS or IBQ in proportion to each recipient's initial allocation of QS or IBQ for each species. Any person that qualifies for an initial allocation of QS or IBQ in excess of the accumulation limits will be allowed to receive that allocation, but must divest themselves of the QS (except for widow rockfish QS) or IBQ in excess of the accumulation limits by November 30, 2015. Holders of QS or IBQ in excess of the control limits may receive and use the QP or IBQ pounds associated with that excess, up to the time their divestiture is completed. Once the divestiture period is completed, any QS or IBQ held by a person (including any person who has ownership interest in the owner named on the permit) in excess of the accumulation limits will be revoked and redistributed to the remainder of the QS or IBQ owners in proportion to the QS or IBQ. On or about January 1, 2016, NMFS will redistribute the revoked QS or IBQ excess percentages to the QS or IBQ owners in proportion to their QS or IBQ holdings based on ownership records as of January 1, 2016. No compensation will be due for any revoked shares.

\* \* \* \* \*

3. In § 660.150, revise paragraph (g)(2)(iv)(B) and add paragraph (g)(2)(iv)(C), and revise paragraph (g)(3)(i)(D) to read as follows:

§ 660.150 Mothership (MS) Coop Program.

\* \* \* \* \*

(g) \* \* \*

(2) \* \* \*

(iv) \* \* \*

(B) Application. NMFS will begin accepting applications for a change in MS/CV endorsement registration beginning September 1, 2014. A request for a change in MS/CV

endorsement registration must be made between September 1 and December 31 of each year. Any transfer of MS/CV endorsement and its associated CHA to another limited entry trawl permit must be requested using a Change in Registration of a Mothership/Catcher Vessel Endorsement/Catch History Assignment Application form and the permit owner or an authorized representative of the permit owner must certify that the application is true and correct by signing and dating the form. In addition, the form must be notarized, and the permit owner selling the MS/CV endorsement and its CHA must provide the sale price of the MS/CV endorsement and its associated CHA. If any assets in addition to the MS/CV endorsement and its associated CHA are included in the sale price, those assets must be itemized and described.

(C) Effective date. Any change in MS/CV endorsement registration from one limited entry trawl permit to another limited entry trawl permit will be effective on January 1 in the year following the application period.

\* \* \* \* \*

(3) \* \* \*

(i) \* \* \*

(D) Divestiture. For MS/CV-endorsed permit owners that are found to exceed the accumulation limits during the initial issuance of MS/CV-endorsed permits, an adjustment period will be provided after which they will have to completely divest of ownership in permits that exceed the accumulation limits. Any person that NMFS determines, as a result of the initial issuance of MS/CV-endorsed permits, to own in excess of 20 percent of the total catch history assignment in the MS Coop Program applying the individual and collective rule described at paragraph (g)(3)(i)(A) of this section will be allowed to receive such permit(s), but must divest themselves of the excess ownership by August 31, 2016. Owners of such permit(s) may receive

and use the MS/CV-endorsed permit(s), up to the time their divestiture is completed. After August 31, 2016, any MS/CV-endorsed permits owned by a person (including any person who has ownership interest in the owner named on the permit) in excess of the accumulation limits will not be issued (renewed) until the permit owner complies with the accumulation limits.

\* \* \* \* \*

[FR Doc. 2012-31546 Filed 12/31/2012 at 8:45 am; Publication Date: 01/02/2013]